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TRADING INDIGENOUS RIGHTS: THE NAFTA SIDE AGREEMENTS AS AN IMPETUS FOR HUMAN RIGHTS ENFORCEMENT

*David P. Kelly**

Protests at the recent World Trade Organization (WTO) conference in Seattle, Washington make certain that free trade is not a universally accepted practice. Compelling arguments exist for and against free trade, and to be sure, its economic benefits could be grand. However, as presently practiced, free trade also breeds “losers”. The losers from free trade are those for whom no CEO speaks; they hold few resources, and have little political clout. The environment and labor are commonly recognized as the greatest potential victims of free trade. Concern for the aforementioned tandem led directly to the drafting and implementation of the Side Accords of the North American Free Trade Agreement. Unfortunately, the list of free trade losers may be greater than many expected. Perhaps no single people have lost more severely in the free trade game than the indigenous of Mexico under NAFTA. Ironically, for the indigenous, in disaster, relief may be found.

This note explores the possibility of using free trade agreements as a vehicle for implementing and enforcing human rights by examining the NAFTA Side Agreements on labor and the environment and the doors such agreements may open for the enforcement of indigenous rights. The discussion will begin with a brief overview of free trade and sustainable development. Part II will look at the political climate, trade policy, and land tenure in Mexico prior and subsequent to NAFTA. The third portion of this work will examine indigenous concerns and reactions to NAFTA. Part V will examine the impotence of UN Documents in protecting such woes, and Part VI will consider the Side Agreements on Labor and the Environment. The final portion of this note will address the theoretical import of linking trade and human rights, with particular regard to advancing the rights of the indigenous.

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I. INTRODUCTION

The basic objective of free trade, or trade liberalization, is to reduce tariff and non-tariff barriers existing between trading nations.¹ In reducing such barriers it is hoped that markets will be opened allowing goods to flow more easily through international boundaries. The impetus of liberalization is mutual benefit; benefit that could not be achieved through unilateral efforts.² Free trade is contingent upon cooperation and dictates that participating nations act reciprocally to implement its conditions.³

Equally important to the success of free trade endeavors is that all participating nations refrain from action that may be "individually beneficial", but detrimental to the regime as a whole.⁴ Due to tariffs, or protective domestic regulation, as applied in Mexico in the mid-1900's⁵, many markets were essentially closed to foreign investors and entrepreneurs. In some instances, markets that may have been technically open possessed barriers making certain trade endeavors unprofitable therein; free trade quashes such practices.

The ultimate goal in free trade is to spur economic growth, generate employment, and allow the economies of the respective participants to expand in new directions.⁶ Free trade is operationalized through the specialization of markets and competitive advantage. Overall, free trade produces integration. Economies of free trading countries become more intertwined and more interdependent than in the past. With these integrations, the rules by which trading nations will operate will also evolve. This evolution will inevitably effect law at both the domestic and international level. Thus, when free trade is discussed and implemented many concerns come to the forefront. Chief among concerns regarding free trade, are the possible effects it will have on the nature, rate, and direction of economic growth, the environment, and social policy throughout participating countries. To be sure, the dialog in this area is far from over.

¹ See BELINDA COOTE, NAFTA POVERTY AND FREE TRADE IN MEXICO, 8 (1995).

² See Maxwell A. Cameron, *North American Free Trade Negotiations: Liberalization Games Between Asymmetric Players*.

³ See *id.* at 2.

⁴ *Id.* citing JOHN MCMILLIAN, GAMES, STRATEGIES, AND MANAGERS (1992).

⁵ Further elaboration upon this issue will be provided *infra* section III. B of this work.

⁶ See COOTE at 9.

In 1987, the United Nations World Commission on the Environment and Development issued a report entitled *Our Common Future*⁷. In that report, the World Commission stated, "humanity has the ability to make development sustainable—to ensure that it meets the needs of the present without compromising the ability of future generations to meet their own needs."⁸ Since the issuance of the report, the notion of sustainable development has emerged as a prevalent topic in the international milieu. Dialog regarding sustainable development burgeoned following the Rio Conference,⁹ receiving "homage" and consideration from governments and non-governmental agencies alike. The years to follow, however, have revealed much of that attention severely impoverished in depth and breadth.

The epistemological goal of sustainable development is to marry the traditionally clashing principles of development and cultural/environmental preservation. Sustainable development rejects the practice (commonplace in each of the three worlds) of development first and clean up later.¹⁰ Rather, sustainable development calls for a controlled development that does not exceed its hosts' capacity.¹¹ According to one commentator, "the basic vision underlying sustainable growth is that of the economy as a physical subsystem of the ecosystem. A subsystem cannot grow beyond the scale of the total system of which it is a part."¹²

The buzz of sustainable growth carried into the 1990's with the passage of the North American Free Trade Agreement. Sustainable growth discourse, particularly in regards to labor and the environment, was acute in pre-ratification negotiations. Groups opposing adoption of the NAFTA questioned the treaty's commitment to the notion, arguing it fell short of

⁷ WORLD COMMISSION ON ENVIRONMENT AND DEVELOPMENT, *Our Common Future* 8 (1987).

⁸ *Id.*

⁹ The U.N. Conference on Environment and Development of June 1992 in Rio de Janeiro, also known as the Earth Summit, brought together leaders of nearly two hundred nations to plan for the future. "The goal of the conference was to develop multinational efforts to combat global environmental problems and efforts to harmonize economic, social, and environmental concerns." *The Road From Rio*, TECHNOLOGY REVIEW, v 96 n3, 60 (1993).

¹⁰ See James E. Bailey, *Perspectives on the North American Trade Agreement: Free Trade and the Environment—Can NAFTA Reconcile the Irreconcilable?* 8 AM. U. J. INT. L. & POL'Y 839, 845 (1993).

¹¹ Herman E. Daly, *From Adjustment to Sustainable Development: The Obstacle of Free Trade*, 15 LOY. L. A. INT'L & COMP. L.J. 33, 41 (1992).

¹² *Id.*

securing appropriate protections.¹³ Criticisms included, inter alia, contentions that the treaty failed to ensure that basic worker's rights were respected, help safeguard the environment, respect the rights of governments to choose their own developmental priorities, and finance local development initiatives and poverty alleviation measures.¹⁴

When the governments of Mexico, the United States, and Canada ratified the agreement, it appeared that at least some of the sustainable development discourse had been taken into account. NAFTA was outlined as a model for sustainable growth.¹⁵ It was framed as an agreement for progress; the economies of the three nations would flourish and their respective constituents enjoy the fruit. A glimpse at NAFTA's preamble, which uses the phrase sustainable growth three times, reinforces the perception.¹⁶ However, one need only turn the page to receive an accurate assessment of sustainable growth's salience in the NAFTA. The phrase sustainable development extends neither into NAFTA's "Statement of Objectives" nor its body.

Proponents of the NAFTA claimed it would create jobs, balance development, promote conditions of fair trade competition, increase investment opportunity, and nurture higher standards of living within all three nations. To some analysts it was an invitation for Mexico to join the first world. Others cite the agreement as perpetuating inequality both between and among bordering countries. NAFTA opponents aptly posit that the agreement has added further to the disparity of Mexican haves and have nots. For those who champion NAFTA, the absence of further mention of sustainable development in the corpus of NAFTA is dismissed as insignificant. To the Maya of Chiapas, Mexico, the void is wholly representative of NAFTA's superficial allegiance to the cause. NAFTA's impact upon the indigenous of Mexico threatens to be anything but sustainable. In the words of Commander Marcos, the leader of a Mayan faction that took up arms against the Mexican government hours after NAFTA was passed, "NAFTA is a death sentence for indigenous peoples".¹⁷

¹³ See BELINDA COOTE, *NAFTA, POVERTY AND FREE TRADE IN MEXICO*, 10 (1995); See also TERRY L. ANDERSON, *NAFTA AND THE ENVIRONMENT*, (1993) (containing several works by scholars discussing the potential impact of NAFTA on the environment).

¹⁴ See COOTE at 44.

¹⁵ See generally Paulette L. Stenzel, *Can NAFTA's Environmental Provisions Promote Sustainable Development?*, 59 ALB. L. REV. 423, 426 (1995).

¹⁶ North American Free Trade Agreement, Preamble

¹⁷ See generally, Ana Carrigan, *Chiapas: The First Post-Modern Revolution*, 19 SPG FLETCHER F. WORLD. AFF. 71 (1995).

Despite one's posture regarding NAFTA, however, the agreement possesses at least one unquestionably novel effect; its side agreements. The Supplemental, or side, agreements to NAFTA, purport to inject further sustainability into the agreement. A Phoenix of heated political contention and pressures, the side agreements were integral to NAFTA's ratification. Without the concessions offered to protect labor and the environment, NAFTA faced an uncertain future. In attaching such protections, NAFTA architects did much to shore needed support.

Although the side agreements do provide measures to comply with this language, they are heavily criticized. According to some commentators the side agreements were attached to the NAFTA for esthetic purposes only. Seminal pieces, NAFTA's side agreements have birthed a somewhat socially conscious trade endeavor. While this categorization may be generous, the side agreements and the enforcement mechanisms included therein, mark an important first step to making trade agreements more congenial to human rights concerns. Now that the door has been opened, trade agreements may represent a new regime in human rights enforcement employing trade as leverage where U.N. documents and international instruments have fallen short.

The significance of NAFTA and its side agreements to human rights, and particularly the rights of the indigenous, is largely theoretical. NAFTA and its side agreements do very little to advance indigenous rights, however, the agreements are pertinent as precedent for future agreements.

II. LAND, POLITICS, AND TRADE POLICY

A. *Early History*

Land tenure in Mexico was troubled long before NAFTA was conceived. Mexican history, particularly that of the southern region, is replete with agrarian struggle and battles for land.¹⁸ In pre-conquistadorial times, private property did not exist in Mexico. Land was a communal resource (ejido communal) which could not be alienated. The nearest semblance of ownership was that one typically worked the same land as his or her ancestors. This type of informal tenure system persisted, particularly among the indigenous, throughout most of Mexico's history.¹⁹

Despite any formal changes in the land tenure system, however, land slowly began to be concentrated in the hands of the moneyed and powerful. Employing private police forces, those with the resources to do so

¹⁸ See *id.*

¹⁹ See *id.*

forcibly acquired ejido land, expelling small time farmers (campesinos).²⁰ Consequently, thousands of peasant subsistence farmers were denied their means of existence. Accordingly, the late nineteenth century saw the emergence of plantation systems and complete dependency.

Peasants were forced to work plantations for meager wages. Without any land of their own, they were unable to grow staple crops and were forced to purchase such necessities from plantation owners. Thus, what little money peasants were able to earn was quickly returned to the plantation owners. In instances where peasants did not have enough money to purchase the goods they needed, some plantation owners allowed tabs to be run. Tabs functioned to further entrench plantation owner control by creating peasant indebtedness, thus allowing for several degrees more of exploitation. This disparity left peasants in virtual slavery.

Rebellion erupted in 1910, when the peasantry rose up against the Mexican Government.²¹ The impetus for the movement was gross disparity in land distribution. Led by revolutionary Emilio Zapata, the peasantry fought for equality and subsistence; principles embodied in land. During the course of the revolution, Zapata kept the insurgency's voice clearly pronounced; return land to its rightful occupants, the Indians.

The revolution culminated with constitutional reform in 1917.²² Article 27 was added to the corpus of Mexico's Constitution. Under Article 27, precise limits were placed on the size of land holdings, and land redistribution laws which included, inter alia, the formal recognition and return of ejido land to the Mayan.²³ Sale of governmentally allocated land was prohibited.

B. Contemporary Times

Following the Mexican Revolution in 1929, the Institutional Revolutionary Party, or PRI gained control of the government. In large part, it was the PRI's promise of land reform that brought it to power and sustained its popularity among the peasant populace.²⁴ Indeed, the PRI initially lived up to its word as massive land redistribution was effectuated. Between 1934 and 1940, while Lazaro Cardenas was president, a tenth of Mexico's

²⁰ See *id.*

²¹ See Dan La Botz, *DEMOCRACY IN MEXICO: PEASANT REBELLION AND POLITICAL REFORM*, 24 (1995).

²² See *id.*

²³ See *id.*

²⁴ See Michael Renner, *Chiapas: An Uprising Born of Despair*, *WORLD WATCH*, Jan-Feb v 17n1, 16 (1997).

land was redistributed to peasants and indigenous communities.²⁵ This feat was accompanied with a decline of the proportion of landless laborers in the rural work force by nearly one half, from 69 to 36 percent.²⁶ Such results were instrumental to the PRI as they firmly secured the loyalties of the poor.

For the first half of the 1900's Mexico was a strong protectionist state. The government took great pains to safeguard domestic economic sectors from foreign competition.²⁷ During this era, as in much of Mexican history, high tariffs were employed to discourage imports and foster internal industrial development.²⁸ The underlying philosophy of protectionism of this variety is that industry in developing nations, or "infant industry" must be allowed to develop free of competition from established markets until it is of the same quality.²⁹ This ideology was reflected in land tenure as foreign investment and land holdings were strictly regulated under Article 27 of the Mexican Constitution.

However, as the century reached its mid point, issues of land tenure began to emerge once again. The pace of land redistribution tapered off quickly after the Cardenas Presidency, and the 1950's were characterized by vast population growth, increasing unrest, with demands for land going largely unmet.³⁰ Protests in which campesinos temporarily occupied large estates were commonplace, and inevitably led to conflict between authorities and peasant protestors. In response, it became common practice for large landowners to hire private security forces. The number of violent clashes between private security forces and campesinos is immeasurable. Growing tensions and little governmental redress led many campesinos to lose faith in the PRI which had controlled the government for the over 30 years by that time.³¹

The late 1960's saw the emergence of the first guerilla movement since the revolution led by Zapata in the early 1900's. Again, the occupations resulted in skirmishes between members and private security forces.

²⁵ See *id.*

²⁶ Prior to the rebellion, 92% of Mexican's were landless. *Id.*

²⁷ See Lee Axelrod, *NAFTA in the Context of Mexican Economic Liberalization*, 11 INT'L. TAX & BUS. LAW. 201, 202 (1993).

²⁸ See *Id.* at 204.

²⁹ See David Dudley, *The Coase Theorem as Applied to trade Barriers and Optimal Adjustment Strategies*, 19 U.P.A. J. INT'L ECON. L. 1029, 1039 (1999)(identifying the "infant industry" argument supporting protectionist trade policy as fallacious).

³⁰ See Renner *supra* note 24 at 17.

³¹ See *id.* at 15.

Experiencing limited success, and paying heavily for their efforts, the Party of the Poor succumbed to the incumbent forces of the PRI and large land-owners that were becoming increasingly incestuous groups.

In an attempt to bring some resolution to the ever-looming land problem, President Luis Echeverria (1970-76) put forward a limited proposal for reform.³² Among other things, the then president's plan called for the development and colonization of eastern Chiapas, which at that time was largely virgin rain forest. Unfortunately, the only lasting effects of Echeverria's plan were deforestation and environmental degradation. The true hallmark of the 1970's was economic development; development made possible through oil.³³

Mexico broke from hard line protectionism in the 1970's. Following a massive financial crisis and peso devaluation in the mid 70's, Mexico began to borrow heavily from foreign investment banks. Coupled with a good history of loan repayment the promise of vast oil reserves allowed Mexico to borrow virtually unlimited amounts of capital.³⁴ The discovery of large petroleum reserves in the south of Mexico, in the face of OPEC price rises, fanned the fires of monetary institutions and the Mexican government alike. Projections of the quantity of oil at that time were thought to surpass that of the Persian Gulf.³⁵ Oil production increased exponentially under the leadership of President Lopez Portillo (1976-82). With global oil prices on the rise, Mexico ushered in a new era of prosperity³⁶ and importance in the international domain. During this period, investment in Mexico, both public and private, reached an all time high.³⁷

Concomitant with the investment surge, the Portillo administration revealed plans to liberalize the Mexican economy.³⁸ The GATT presented a prime opportunity to begin such an endeavor. Mexico entered accession negotiations in 1979.³⁹ However, despite exceptionally favorable terms, President Portillo declined to join the agreement.⁴⁰ The decline was rooted

³² See *id* at 16.

³³ See *id* at 19.

³⁴ See generally Axelrod *supra* note 27.

³⁵ See *id*.

³⁶ To be sure, the prosperity was not felt by all. Despite an increase in oil sales from \$500 million in 1976, to \$6 billion in 1980, conditions remained desperately poor in the south of Mexico.

³⁷ See *id*.

³⁸ See Cameron *supra* note 2 at 7.

³⁹ See *id*.

⁴⁰ See *id*.

in Portillo's belief that Mexico need not forge such connections in the wake of its burgeoning petroleum power.⁴¹

Rather than formally ascribing to interdependence, the Mexican government believed it might benefit more by remaining an individualistic actor. "Oil would be used, not only to foster further economic integration on advantageous terms, but to reduce dependence on the United States."⁴² As Mexico was already gaining access to United States markets, the extra step of joining GATT seemed superfluous, a practice identified by one commentator as "free riding".⁴³ Unfortunately, this blind optimism also led to the accrual of approximately \$80 billion in external debt.⁴⁴

The 1980's proved a rude awakening for the Mexican economy. An OPEC engineered price increase on petroleum brought Mexico's boom-related productivity and independence to an abrupt halt. The price increase bred hikes in international inflation, which in turn yielded global recession; efforts to conserve fuel among consuming countries followed.⁴⁵ The end result left oil producing countries in the precarious position of having to flood the very market they attempted to manipulate through supply side economic strategy. Consequently, oil prices drastically declined as the oil spigot was opened wide.

Accordingly, the Mexican economy suffered. The early 1980's were dominated by skyrocketing inflation rates, withdrawal of foreign investment, large government deficits, drastic reductions in social services, unemployment, declines in real wages, and decreased health nationwide.⁴⁶ The trends continued in whirlwind fashion ultimately yielding massive currency devaluation in Mexico.⁴⁷ Efforts to reverse the trends by international lending institutions and governmental restructuring were largely unsuccessful, at times exacerbating further the economic despair.⁴⁸

Substantive structural adjustment began with the election of the Madrid administration (1982-88). President Miguel de la Madrid promulgated policy aimed at liberalization. Under Madrid, Mexico markedly shifted focus from locating internal sources of wealth to soliciting external

⁴¹ See *id.*

⁴² See *id.* at 8, citing Corredor 1983:137-165; Ojeda 1982: 322

⁴³ See *id.*

⁴⁴ See Axelrod, *supra* note 27.

⁴⁵ See Cameron *supra* note 2, at 10

⁴⁶ See *id.*

⁴⁷ See *id.*

⁴⁸ See *id.*

investment and market access.⁴⁹ Trade and foreign investment were viewed as the primary elements of change by the new regime.⁵⁰

However, without the leverage that petroleum once provided Mexico, access to non-petroleum markets was greatly restricted. No longer in a position to "free ride", it became necessary for Mexico to partake in trade agreements. Such conditions ultimately led Mexico to accede to the GATT.⁵¹ Without the bargaining power of the previous decade, Mexico acceded under far less favorable conditions.⁵² "Mexican policy makers made unilateral concession in order to join the GATT, and yet achieved little in terms of reciprocity".⁵³ Where Mexico was once able to dictate conditions, they were forced to accept much less palatable terms.

Despite the less than ideal conditions of the GATT, Mexico held fast to its outward looking development plan. The Salinas administration (1988-94) built upon the momentum started under Madrid by pushing for membership to NAFTA. To become an attractive candidate for NAFTA membership, the government of Mexico took several steps to enhance its appearance for foreign investment. Most relevant to the instant matter were the steps taken to demonstrate the availability of Mexican land for investment and development by U. S. and Canadian corporations. Most notable in such actions was the Mexican government's overhaul of Article 27 of the Mexican Constitution.

The reforms to Article 27 of the Constitution were proposed in November 1991 and put into affect two months later. Closely following this action, an Agrarian Law was implemented, establishing a new regulatory framework for the social sector. It was the government's contention that changes in the preexisting framework were necessary in order to attract and encourage private investment in the agriculture. Such investments, it was postulated, would lead to increased productivity and welfare.⁵⁴ The four most fundamental alterations as put forward by the new law were as follows:

1. Ejidatorios were given the legal right to purchase, sell, rent or use as collateral the individual plots and communal lands which make up the ejido.

⁴⁹ See Axelrod *supra* note 27, at 11.

⁵⁰ See *id.*

⁵¹ See Cameron *supra* note 2, at 11.

⁵² See *id.* at 13.

⁵³ *Id.* at 14.

⁵⁴ See Neil Harvey, REBELLION IN CHIAPAS: RURAL REFORMS, CAMPESINO RADICALISM, AND THE LIMITS TO SALINISMO, 24 (1994).

2. Private companies were allowed to purchase land in accordance with the legal limits ascribed to different crops. At maximum, a company with at least twenty-five individual shareholders could purchase holdings of up to twenty-five times the size of individually permitted limit.
3. The reforms also allowed for new associations between capitalists and ejidatario;
4. In line with the reform's intention of guaranteeing security for private property, the sections of Article 27 which allowed for campesinos to petition for land redistribution were deleted from the new law.⁵⁵

The absence of formal protection, and the elimination of a venue for appeal and dispute resolution, effectively cut off any avenues the indigenous had in protecting ejido land.⁵⁶ The amendment opened the door for the sale of ejido land, making it even easier for large landholders and foreign investors to push campesinos (peasant farmers) off their land. Previously, campesinos could have the permanent right to farm a parcel of ejido land, but they could not own the land outright. The changes to Article 27 allowed for the direct ownership and sale of land. While their holdings and wealth may be small, the sheer number of rural peasants and campesinos is gargantuan. In putting an end to land redistribution policy, President Salinas effectively disenfranchised over twenty five million citizens nationwide. As stated by one commentator, Salinas "robbed many peasants not just of the possibility of gaining a piece of land, but, quite simply of hope."⁵⁷

Further capturing the sentiment, a young indigenous campesino voiced his concerns regarding the amendment as follows: "the land is all we have, all we know. Without the land. . .we will be begging on the streets of Mexico City or working as peons like our grandfathers did."⁵⁸ It is clear that the pending changes to the tenure system encompassed a great deal more than the land, which the campesinos worked. Rather, the amendment was an outright assault on rural life and indigenous culture. As the young campesino emphasized in the quote above, to take land from the indigenous is taking their lives.

The most consistent feature of land reform in Chiapas is the manner in which large landholders have been able to elude and frustrate attempts for change. According to a 1997 World Watch Report, large landowners in

⁵⁵ *Id.*

⁵⁶ *See id.*

⁵⁷ *See id.*

⁵⁸ *See id.*

Chiapas have managed to delay or halt land transfers often with the help of their own paramilitary bands and with the collusion of police, military, and PRI officials.⁵⁹

III. NAFTA AND THE INDIGENOUS

To fully comprehend the relationship between NAFTA and the indigenous, and the indigenous reaction thereto, discussed *supra*, it is requisite to examine the political climate in Chiapas, with particular regard to the relationship between the indigenous and the controlling party of the Mexican government, the PRI. Despite an initial and fairly long allegiance to the PRI, relations between the PRI and rural poor began to decay in the late seventies. The fall out was concurrent with Mexico's shift away from domestic protectionism toward international economic efforts. The medium Mexico employed to play the international market, petroleum, was extracted in large part from Chiapas and other southern states.

During the oil crisis in the United States during the 1970's, Mexico found itself in a unique strategic position. A non OPEC nation, Mexico was able to become a major force in oil exporting. The promise that oil brought for Mexican development was previously unparalleled. However, petroleum may have also given the Mexican government a false sense of security and perhaps an air of arrogance. With Mexico's new found importance in the international market, governmental/ PRI attention focussed thereon, resulting in a contemporaneous brushing aside of domestic matters. Domestic matters of low rank to the PRI prior to the Mexican oil boom were secluded further during this period. Thus, through its natural resources, Chiapas was enabling its own neglect. Despite being a time of national prosperity, the indigenous of Mexico received less governmental assistance than they had in the past.

The relationship between the indigenous and the PRI was strained further by the Mexican debt prices of the 1980's. During the boom of the 70's, Mexico borrowed a great deal of capital from international institutions.⁶⁰ When oil prices plateaued and OPEC once again increased its exports, Mexico's importance in the petroleum regime decreased significantly, leaving Mexico with enormous debt.⁶¹ Unable to pay-off boom related endeavors, the Mexican government was forced to revert to

⁵⁹ See generally Renner *supra* note 24.

⁶⁰ See Andy Gutierrez, *Codifying the Pat, Erasing the Future: NAFTA and the Zapatista Uprising of 1994*, 4 HASTINGS W. N.W. J. ENVTL L. & POL'Y 143, 149 (1998).

⁶¹ See *id.*

more conservative economic practices. This conservatism led to decreases in domestic spending. Social services and welfare programs for the indigenous and rural poor were among the first programs to be slashed. Already desperately poor, the cuts in assistance were hard felt by the rural poor. The PRI's neglect in the 70's and failure to meet needs in the 80's caused party loyalty to falter, especially among the indigenous.⁶² The peasantry felt betrayed by the PRI; the party they were instrumental in bringing to power.

With loyalty in question, and opposition visibly present for the first time in 50 years, the PRI began to worry about the future of its hegemony. The PRI's concerns, and the extent to which it was prepared to protect its control became evident in the 1988 presidential campaign.⁶³ The unexplained withdrawal of contending candidate Cuauhtemoc Cardenas within weeks of the campaign smacked of corruption.⁶⁴ Blatant fraud at the polls further confirmed the lengths to which the PRI would take to preserve its control. Events as conspicuous as missing ballot boxes and timely power outages exacerbated already mounting opposition to the PRI's reign.⁶⁵ The election was commonly recognized as a gross perversion of the democratic process.⁶⁶ Electoral fraud was yet another mechanism to limit indigenous participation and ensure tyranny of the majority.

Accordingly, NAFTA's implementation in 1994 proved a crystalizing event in which past oppressions were magnified in light of present events and the futures they might carry. To the indigenous, NAFTA embodied the root of all their problems. Indigenous concerns were long ignored by the government. NAFTA presented a quintessential instance of the government's failure to consider indigenous views. Taken with the changes in land tenure, *supra*, Mexico's indigenous were further alienated by the prospects of NAFTA's agricultural provisions. Under the provisions, protections formerly extended to rural agriculture would be eliminated and domestic markets opened to international competition. Most Chiapans are campesinos, or small time farmers who earn their livelihood cultivating corn.

⁶² See *id.*

⁶³ See Dick J. Reavis, *Chiapas is Mexico*, THE PROGRESSIVE, May v58n5, 31 at 35 (1994).

⁶⁴ See *id.*

⁶⁵ See *id.*

⁶⁶ See Leslie Alan Horvitz, *Mexico's ruling party faces day of reckoning: a historic election south of the border will determine whether machine politics give way to true democracy or to a costly period of national unrest*, INSIGHT ON THE NEWS, August 29, v10 n35,11 (1994).

NAFTA, which aimed to achieve "greater market access, including: the elimination of tariffs, import and export restrictions; drawback reform, customs user fees; and country of origin markings", as well as "removing tariff and non-tariff barriers to agricultural products" was perceived as a direct threat to that market. Any surplus the Mayan may be able to generate simply cannot compete with either the quality or price of that being imported. Hence, indigenous products would no longer be desirable.⁶⁷ Accordingly, the indigenous, who are largely subsistence farmers, would have to pit any surplus they were able to produce directly against the agribusiness of Canada and the United States, forces with which they could not contend.⁶⁸ The introduction of lower priced, higher quality produce, especially corn, the staple crop for both subsistence and sale,⁶⁹ was potentially devastating. With the influx of foreign grown produce, a push in Mexico to become more agriculturally competitive, and changes to land tenure, campesinos faced the very real possibility of losing not only markets but the land which provided their subsistence.

The campesinos had many of the same fears that small time family farmers had in Canada and the United States decades ago. Free market competition has indeed forced many farmers in Canada and the United States to either work for conglomerates or leave the agriculture business altogether. While initially disturbing, many commentators assert that such agri-industrial Darwinism is vital to developing a strong, efficient economy, and that the selection process ultimately benefits society as a whole. Noteworthy, is the fact that the transition many family farmers made in both Canada and the United States were arduous. The metamorphoses of the agriculture business in both Canada and the United States was greatly aided by governmental subsidies and support; support that will be unavailable in poorer countries like Mexico.

Unlike farmers forced out of business in the United States and Canada, those of Chiapas will be effectively forced to give up their culture. While the farming tradition is very strong in the U.S. and Canada, it pales in comparison to the importance of corn to the Maya. Corn is the backbone of Mayan society. The Maya have raised corn for over 2,000 years, and in that

⁶⁷ Robert Rodriguez & Parisis Gonzales, *Indigenous Peoples need a New Form of Trade*, FRESNO BEE, January 6, 1997.

⁶⁸ See *id.*

⁶⁹ 'In Mexico, corn is more than food. It is culture, religion, and national identity,' says Eduardo Pesqueira, Mexico's representative to the United Nations Food and Agriculture Organization. The Mexican identification with corn is so thorough that in the Mayan creation myth—the heritage of the Chiapas indigenes—mankind was the child of corn, not the reverse. Reavis, *supra* note 63, at 31.

time it has grown an inseparable part of their existence. While many of the world's inhabitants have surrendered their ways of life to surging global economic forces, far fewer have been coerced into forfeiting their faith. As eloquently phrased by one commentator, "maize is the center of everything for us. It is our culture."⁷⁰

With this new competition and few other employment options, already disparate living conditions threatened to become worse. Mexico's indigenous population is most heavily concentrated in the south,⁷¹ and not coincidentally, it is "precisely" in that region "that can be found a systematic political, juridical, economic violence."⁷² Indeed, the indigenous of Mexico are longstanding acquaintances of poverty and oppression.⁷³ Despite being one of Mexico's richest states for natural resources⁷⁴, Chiapas, Mexico's southern most state, is desperately poor⁷⁵ with atrocious living conditions.⁷⁶

⁷⁰ La Botz *supra* note 21, at 25.

⁷¹ "As a general rule, the farther one goes into the countryside, the more primitive the conditions and the less likely that such amenities will be available. Altogether it has been estimated that almost 70% of the population in Chiapas live below Mexico's official poverty line". Moguel (1994).

⁷² Paul Rich, *NAFTA and Chiapas*, 550 ANNALS AM. ACAD. POL. & SOC. SCI. 72 (1997).

⁷³ KROOTH, MEXICO, NAFTA AND THE HARDSHIPS OF PROGRESS: HISTORICAL PATTERNS AND SHIFTING METHODS OF OPPRESSION (1996).

⁷⁴ A cursory glance of national statistics reveals the net worth of Chiapas. The region's oil and natural gas resources account for 21% and 47% of the country's total production respectively. Fifty five percent of the country's electric power is produced in Chiapas. See O. Hidalgo *Economia del Estado de Chiapas, Mexico, DF*: CENTRO DE INFORMACION Y ANALISIS DE CHIAPAS A.C. (1988). Agriculturally, Chiapas is also quite productive. Chiapas yields 35% of the nation's coffee, sustains over 3 million head of cattle, and is the nation's second largest producer of corn. See *id.* Honey, cacao, tobacco, sugar, soy, melon, sorghum, mamey, mango, tamarind, and avocado occupy the arable land that remains. See *id.*

⁷⁵ The economic situation in Chiapas is extraordinarily paradoxical. To be sure, Chiapas is a province of abundant natural resources. It is a site of rich and fertile farmland, the producer of a considerable amount of hydroelectric power, and the host of vast oil reserves. However, despite all its natural wealth, the bulk of the Chiapas population subsists in abject poverty.

⁷⁶ Statistics on living conditions and development in Chiapas are alarming. The health conditions of the people of Chiapas are also extremely poor. One and a half million people have absolutely no access to medical services. For every 3000 inhabitants there are 0.2 clinics, one fifth the national average. There are 0.3 hospital beds for every thousand people, 0.5 doctors for every 1,000 people and one operat-

Taken together, NAFTA was a final outrage, which threatened to drain the lifeblood of most Chiapans. As stated by one campesino, "[f]or us campesinos, the problem is that we are just beginning to understand all the implications of free trade and having to compete against U.S. farmers. We don't know why it has to be this way, but it probably means the end to our communities".⁷⁷

IV. INDIGENOUS REACTION

Reduced to its most basic elements, NAFTA's impact upon the indigenous may appear exclusively land centered.⁷⁸ To be sure, the importance of land to the indigenous cannot be overstated. However, NAFTA's impact on indigenous land holdings was really an outward manifestation of much more; the manifestation of total marginalization. As an agrarian indigenous people, NAFTA's assault on the Mayan has been multidimensional. Lower labor and operation costs make Mexico an attractive venue for multinational corporations to locate their facilities. The facilities require land, and the most easily attainable plots are those without clear ownership, the ejido communal. Consequently, native peoples are being driven into the mountains and jungle and forced to attempt to cultivate largely unarable land. Thus, crop yields among the indigenous have been drastically reduced.

Additionally, but in many ways inseparable, NAFTA is an assault on indigenous culture. The significance of land to the indigenous is vast, including but transcending its necessity for subsistence. Identity, spirituality, and culture all stem from specific land, from which divorce is not possible. Thus, relocation of native peoples, as was done in the United States or displacement carries implications not easily understood by those outside the native world.

ing room per 100,000 inhabitants. See Rafael Sebastian Guillen Vincent, *A tourist guide to Chiapas*, MONTHLY REVIEW vol 46, 8-19 (1994). As may be expected, health and nutrition go hand in hand. Fifty four percent of the Chiapan population suffers from malnutrition. The areas with the highest indigenous populations, the malnutrition rate soars to approximately eighty percent of inhabitants. See *id.* An astonishing 90% of indigenous children are said to suffer from malnutrition. Every year hundreds of children die from diarrhea or other ailments that are easily correctable with basic medical treatment. See *id.*

⁷⁷ Guitierrez *supra* note 60, at 152.

⁷⁸ See Marco A. Almazan, *NAFTA Revisited: Expectations and Realities*, 550 ANNALS AM. ACAD. PL. & SOC. SCI. 42, 46 (1997).

Within hours of NAFTA's passage, thousands of masked⁷⁹ Indians armed with machetes, clubs, spades, and a very few guns, invaded and seized the colonial city of San Cristobal de las Casas and five other towns in the surrounding the Chiapas highlands.⁸⁰ Then President Salinas responded to the siege with a massive strike involving tanks, helicopters, and the deployment of over 15,000 troops.⁸¹ Salinas initially labeled the uprising as the work of "a group of professionals of violence, probably foreigners"; however, the world soon learned of the insurgency's domestic nature. The rebels revealed themselves as the Ejercito Zapatista de Liberacion (EZLN)⁸² or Zapatistas⁸³, a collection of the indigenous who inhabit Chiapas.

The Declaration of the Lacandon Jungle, a Zapatista press release that accompanied the New Year's Day uprising, allowed the world a

⁷⁹ The rebels covered their faces with masks and bandanas as an act of symbolism. As explained in press releases made by the EZLN, the masks were not intended to preserve the identity of the insurgents, but rather as a statement that they had been ignored. The EZLN would later reveal: "the masks hid nothing, because they were the sin rostro, the 'faceless' mass of Indians and peasants who had been neglected and ignored by the Mexican government." La Botz *supra* note 21, at 1.

⁸⁰ See Gustavo Esteva, *Basta! Mexican Indians Say "Enough"*, 24 THE ECOLOGIST 83 (1994).

⁸¹ *Id.*

⁸² The Ejercito Zapatista de Liberacion (EZLN) is a group composed primarily of indigenous peoples of the Chiapas area. The indigenous of Chiapas, as elsewhere in Mexico, are primarily peasants or cottage artisans. They hold the characteristic of having Mayan descent, but are divided into four important language groups, Tzeltal, Tzotzil, Zoque, and Tojolabal. It is not, however, and exclusively indigenous organization. The EZLN encourages all sympathetics to join the cause. The EZLN members range from campesinos and other agrarian workers, to doctors, lawyers, and academics. Zapatista supporters in Mexico were said to be at least 70,000 by early 1993. See Reavis *supra* note 63, at 28.

⁸³ The Zapatistas take their name and basic ideology from Emiliano Zapata, the leader of a peasant army during the Mexican Revolution of 1911 to 1917. Already immensely popular, Zapata's assassination in 1919, made him a figure of mythic proportions. Today he continues to serve as martyr and hero, providing inspiration and hope to campesinos throughout Mexico. The influence of Zapata is still of such great magnitude that the slogans his army fought under are commonly voiced by the Zapatistas of today: "The land belongs to those who work it!", or "it is better to die on your feet than to live on your knees!" Protest cries such as: *a ya basta* (enough is enough), and *aquí estamos* (here we are), are commonplace at protests and rallies, serving as a constant reminder of the Zapatista's unrest. See Renner *supra* note 24, at 13.

glimpse into the center of the storm. Powerful and succinct, the declaration still resonates throughout the world:

We are the product of 500 years of struggle:
first against slavery in the War of Independence against Spain, then to escape from being absorbed by North American expansion. . . . We have nothing to lose, absolutely nothing, no decent roof over our heads, no land, no work, poor health, no food, no education, no right to freely and democratically choose our leaders, no independence from foreign interest, and no justice for ourselves or our children. But we say enough, Basta! We are the descendants of those who truly build this nation. We are the millions of dispossessed, and we call upon all of our brethren to join our crusade the only option to avoid dying of starvation!

Following the Declaration, the world became acquainted with Subcomandante Insurgente Marcos, the leader of the Zapatista movement. Speaking articulately from behind a black ski mask, clad in guerilla fatigues, Marcos quickly captivated the international media. Marcos organized the native population and brought order and attention to their most pressing needs by presenting them as byproducts of globalization, amoral capitalism, governmental corruption, and above all else, outright and wanton neglect of the indigenous population. With great eloquence, Marcos spoke for a people long silenced and ignored.

Marcos' efficacy and presentation propelled him to mythical stature. He is identified as pet warrior and philosopher extraordinaire. While his true identity is unknown, some believe he was a college professor prior to the rebellion. His control of revolutionary dogma and grasp of world events lend credibility to the belief. To be sure, Marcos' connection with the Zapatistas is intriguing. Marcos is not native, and visible skin from around the eye holes of his mask reveals him to be Caucasian. Hence, it appears Marcos was not a victim of the discrimination laden on those he now leads. The involvement of a non-native in the rebellion is identified by some as instrumental to its impact. According to one commentator, with his mastery of the idioms of both Mexico's, Marcos has built bridges between the remote Indian villagers of the rainforest and the white/mestizo dwellers of the urban centers, so that for the first time, Bonfil's 'two cultural universes' have become accessible to each other."

To be sure, Marcos was pivotal in mobilizing the masses and vocalizing indigenous concerns. The indigenous were a forum-less victim. Without the conduit to the first world that Marcos provided, indigenous voices would not have risen over the noise of globalization. Marcos is an

artful communicator, and in studying interviews and press releases, it is difficult not to be swooned by his words. When asked in an interview about the circumstances surrounding the rebellion Marcos responded to one interviewer as follows:

We think that when the uprising took place on the first of January, the globalization process, which coincided with Mexico's formal incorporation to NAFTA, meant the sacrifice of a part of humanity. In our case, it meant the sacrifice of the indigenous, of all indigenous Mexicans but particularly the indigenous of Chiapas. . . what neo-liberalism has done—the process of world globalization in NAFTA—is to eliminate a part of this population, annihilating them, forgetting them, wiping them from the face of the Earth. . . So this is what we say, 'Enough already.' Our revolution is a revolution of words to say, 'here we are.' Our unique way to make this country and this world remember us, paradoxically, is by hiding ourselves. In order to show who we are, we hide, by wearing ski masks, inside a clandestine organization, using this ambiguous method to tell the country, 'here we are, we are many, we are millions, and this country is forgetting about us.'

The mission of the Zapatistas is to bring about political, economic, and social change in Mexico that will allow indigenous people once again to "live" their lives.⁸⁴ The roots of the struggle spring from a long history of marginalization and oppression of the indigenous, but the call extends to all Mexico's poor. The rebellion was a manifestation of years of neglect and forced "development".⁸⁵ It was an expression of the dire necessity for change.⁸⁶ When asked why the uprising took place, one young EZLN member candidly remarked, "They wretched off our fruits. . . They ripped

⁸⁴ NEIL HARVEY, *REBELLION IN CHIAPAS: RURAL REFORMS, CAMPESINO RADICALISM AND THE LIMITS TO SALINISMO*, 3 (1994).

⁸⁵ *Id. at 1*.

⁸⁶ In the words of Samuel Ruiz, a Catholic bishop of San Cristobal, who mediated between the Zapatistas and the Mexican Government:

the Zapatistas do not want to represent all the people of Mexico, but rather to make an appeal to the whole nation from the perspective of the marginalized indigenous—so that all sectors of Mexican society can participate in building a better country. . . after all this is over, the Zapatistas do not want to become a political party or a movement. Rather they want those in power

off our branches. . . They burned our trunk. . . But they could not kill our roots."⁸⁷

Among the most vocal demands of the Zapatistas are those for free elections and land reform.⁸⁸ With both land and political power highly concentrated in the hands of the elite, campesinos and rural laborers were reduced to substandard living conditions. While the fighting lasted only for two weeks, the dialog the uprising started is far from over. The physical violence was largely an exercise in symbolism. It was a strategic act to draw attention to the cause. Under Marcos' command the Zapatistas are focussed upon systemic change, at both the national and international frontiers.

To be sure, political, social, and economic, conditions served as catalysts to the rebellion. As articulated in the First Declaration of La Realidad For Humanity Against Neoliberalism:

During the last years, the power of money has presented a new mask over its criminal face. Disregarding borders, with no importance given to races or colors, the Power of money humiliates dignities, insults honesties and assassinates hopes. Renamed as "Neoliberalism", historic crime in the concentration of privileges, wealth and impunities, democratizes misery and hopelessness.⁸⁹

While many may dismiss the above statement as rhetoric, limited amounts of empirical data lending weight to post-rebellion indigenous fears is starting to emerge.

Real median wages have declined in Mexico, the United States and Canada since NAFTA's implementation, hence already desperately low

to open the system to participation of all. They want power to no longer be based on domination, but on service and participation.

⁸⁷ Estava, *supra* note 80, at 83..

⁸⁸ In sum the Zapatistas posted a comprehensive list of 34 demands. In addition to the demands for fair and open elections and land reform, the Zapatistas' demands were quite diverse, ranging from the demands that housing be built in all rural areas, that rural communities be provided with necessary services such as electricity, running water, roads, and sewage systems, to demands for the right to practice their culture, be free of discrimination, and that NAFTA be revised to as to take into account the indigenous population. *See* La Botz, *supra* note 21, at 11.

⁸⁹ FROM THE MOUNTAINS OF MEXICAN SOUTHEAST. THE INDIGENOUS REVOLUTIONARY CLANDESTINE COMMITTEE GENERAL COMMANDED ZAPATISTA ARMY OF NATIONAL LIBERATION. LA REALIDAD PLANET EARTH, AUGUST 1996.

wages have been reduced further in Mexico.⁹⁰ Consequently, it was estimated that 40,000,000 people, nearly half of the entire population of Mexico earned less than five dollars a day in 1996.⁹¹ A report issued by Mexico's Autonomous University in 1996, identified over fifty percent of the Mexican population as "extremely poor" in stark contrast to the third of the population that could be categorized as such prior to the implementation of NAFTA in 1993.⁹² A study conducted by the economics department at Banamex, one of Mexico's largest banks, in 1996, "92 million people consume less than the minimum requirement of 1,300 calories".⁹³ According to the National Institute on Nutrition, "an estimated 350 people die each day from hunger and related diseases."⁹⁴

To be sure, large variations exist in the interpretation of NAFTA's impact upon all three of its parties. The studies cited are unique in that they focus primarily on the indigenous. The majority of NAFTA impact analysis takes a much larger view. In a survey of reports one encounters more positive reports on NAFTA than negative. Consensus seems to be that it is still much too early to speak resolutely to NAFTA's success, especially since some of the most sensitive industries, such as agriculture and textiles, are subject to a fifteen year tariff phase out policy. While some would say that the worst is yet to come for Mexico's campesino farmer, or that the life blood is being slowly drained therefrom, others would assert the policy provides a cushion so that transitions may be made.

V. HUMAN RIGHTS VIOLATIONS AND CONCERNS FOR THE INDIGENOUS

The development in Chiapas presents several important human rights questions. Generally, the crisis in Chiapas deals with the conflict between economic development and the rights of a minority group to preserve their culture and means of survival. Where the legal ownership of land is unclear, as in Chiapas, or where agreements between governmental bodies and indigenous populations have been nullified or dishonored, the possibilities of human rights violations stemming from land disputes increase exponentially.⁹⁵ Competing with commercial and sometimes govern-

⁹⁰ See Lori Wallach & Robert Naiman, *NAFTA: Four and a Half Years Later*, 28 *THE ECOLOGIST* 174 (1998).

⁹¹ See *id.*

⁹² *Id.*

⁹³ John Ross, *In Mexico, The Struggle Grows for Basics: Hunger for Beans, Tortilla Provokes Protest, Food Raids*, 32 *NATIONAL CATHOLIC REPORTER* 17 (1996).

⁹⁴ *Id.*

⁹⁵ AMNESTY INTERNATIONAL, *HUMAN RIGHTS VIOLATIONS AGAINST THE INDIGENOUS PEOPLES OF THE AMERICAS* 35 (1992).

mental resources and plans for development, indigenous interests are ignored and rights violated.⁹⁶ While the Zapatistas took up arms against the Mexican government, Commander Marcos cites economic globalization or Neoliberalism as the true enemy, identifying the philosophy as: "the global economic process to eliminate that multitude of people who are not useful to the powerful groups called 'minorities' in the mathematics of power, but who happen to be the majority population in the world", and referring to it as "global decomposition" and "the fourth world war."⁹⁷

The Zapatistas do not oppose development altogether, nor do they seek or desire to become a sovereign nation. Rather, they are a people within a nation that wishes their rights to be honored and concerns addressed. The Zapatistas reject superimposed development or that which comes from above and call in its stead for self-determination and sustainability; a coexistence of "progress" and traditional culture.⁹⁸

⁹⁶ According to one commentator:

The activities of large, increasingly internationalized multinational corporations affect the lives in many cases to the same extent as the activities of the governmental entities. It is clear that multinationals may indirectly affect the socioeconomic human rights of citizens of the Third World countries by participating in and encouraging export-oriented economic policies. These policies often contribute to increased unemployment, food and nutritional shortages, high levels of urbanization, and direction of social resources into those economic sectors which generate foreign exchange rather than into social programs. In addition, multinationals in some instances directly violate the civil and political human rights of individuals by pursuing policies which violate freedom of association (opposition to unionization), which perpetuate racial discrimination (support apartheid), and which may result in genocide (*support of policies which result in the destruction of aboriginal peoples*), by engaging in activities harmful to the health and welfare of individuals, and by interfering with the civil and political freedom of individuals (subsidization of repressive regimes and support for the overthrow of regimes perceived as ant-multinational). (Emphasis added).

Matthew Lippman, *Multinational corporations and Human Rights*, in HUMAN RIGHTS IN THE WORLD COMMUNITY: ISSUES AND ACTION, 393 (Richard Pierre Claude & Burns Weston, eds. 1992).

⁹⁷ Subcommandante Marcos' message to "Freeing the Media" Teach-in, NYC January 1997.

⁹⁸ *Id.*

While some of the Zapatistas' concerns are protected by UN instruments to which Mexico subscribes, the bulk reside in the Draft Declaration on the Rights of Indigenous Peoples and are therefore non-binding at present.⁹⁹ Further troubling, the presence of protections in the instruments to which Mexico is a party are neither sufficient in scope nor potency. Despite ratifying to Universal Declaration of Human Rights, International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social and Cultural Rights, there is a paucity of domestic regulation implementing the instruments. Accordingly, the Zapatistas are largely without a forum for relief.

Moreover, many of the rights sought by the Zapatistas have been historically labeled as second or even third generation rights, particularly those pertaining to indigenous culture and religion. For, it is these rights that collide most violently with the ever present forces of neoliberal development. Until the Draft Declaration on the Rights of Indigenous Peoples is ratified, and it may never be, the indigenous of Mexico and the rest of the world must pursue other avenues for protection and redress.

VI. THE NAFTA SUPPLEMENTAL AGREEMENTS

The supplemental, or side agreements, are largely children of politics. Concerns regarding the NAFTA's impact on the environment were raised as early as 1990.¹⁰⁰ "Of particular concern to some environmentalists reviewing the original draft was a lack of coincidence in the existing provision's ability to guard against deterioration of environmental quality. Spe-

⁹⁹ Most pertinently, article 3 provides that "indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development." Article 4 grants indigenous peoples "the right to maintain and strengthen their distinct political, economic, social and cultural characteristics, as well as their legal systems, while retaining their rights to participate fully, if they so choose, in the political, economic, social and cultural life of the state." Article 10 provides that "indigenous peoples shall not be forcibly removed from their lands or territories. No relocation shall take place without the free and informed consent of the indigenous peoples concerned and after agreement on just and fair compensation, and where possible, with the option of return." Article 19 endows the indigenous with "the right to participate fully, if they so choose, at all levels of decision-making in matters which may affect their rights, lives and destinies through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions."

¹⁰⁰ See Joseph F. DiMento & Pamela M. Doughman, *Soft Teeth in the Back of the Mouth: The NAFTA Environmental Side Agreement Implemented*, 10 GEO. INT'L ENV'T'L L. REV. 651, 661 (1998)

cifically, they cited the absence of guarantees for continued availability of trade sanctions to enforce international environmental agreements."¹⁰¹ The widespread attention brought to the matter by environmental groups prompted then President Bush to release a statement that environmental concerns would be considered in future NAFTA negotiations.¹⁰²

However, despite the attention brought to environmental concerns, the leaders of Mexico, the United States, and Canada were extremely reticent to include provisions within the corpus of NAFTA requiring enforcement of domestic environmental regulations, and the proposition of sanctioning options was severely shunned.¹⁰³ The 1992 United States presidential race was dominated by debate regarding NAFTA.¹⁰⁴

The Bush administration praised the agreement, positing it would significantly benefit the U.S. economy by increasing exports and expanding the job market. Presidential hopeful Ross Perot took a hard line against NAFTA proclaiming that it would be disastrous to the U.S. economy. Perot's contentions were rooted in the idea that many corporations would migrate south to Mexico where labor costs were cheaper¹⁰⁵ and environmental standards less strict. President Clinton pressed strongly for NAFTA, however, he faced opposition even from within his own party. Contention within the Democratic Party made it clear that there would be no NAFTA without the creation and implementation of supplemental agreements that would protect labor and environmental interest.¹⁰⁶

Discussion of the possible effects that NAFTA would have on the indigenous populations of any of the party nations was absent from pre-ratification dialog. While the indigenous of each nation did have concerns, they were not addressed. There is no record of any discussion regarding NAFTA's potential impact on the indigenous in Congress. Furthermore,

¹⁰¹ *Id.* Citing Gilbert R. Winham, *Enforcement of Environmental Measures: Negotiating the NAFTA Environmental Side Agreement*, 3 J. ENV'T. & DEV. 1 (1994).

¹⁰² *See id.*

¹⁰³ *See id.*

¹⁰⁴ *See generally* Robert Housman, *The North American Free Trade Agreement: Lessons for Reconciling Trade and the Environment*, 30 STAN. J. INT'L L. 379, 381 (1994); *See also* Xavier Carlos Vasquez, *The North American Free Trade Agreement and Environmental Racism*, 34 HARV. INT'L L. J. 357, 359 (1993).

¹⁰⁵ *Inter alia*, Perot's concerns were premised on the differential in hourly compensation between U. S. and Mexico. In 1990, hourly wages in Mexico were \$1.85, drastically below the \$14.83 in the United States and \$15.94 in Canada. *See generally* Lee Axelrod, *NAFTA in the Context of Mexican Economic Liberalization*, 11 INT'L TAX & BUS. L. 201 (1993).

¹⁰⁶ *See* Housman *supra* note 104.

even if objections were raised, the fast track process in the U.S. gave little time for filing. Similarly, although highly relevant to indigenous well being, neither side agreement mentions the indigenous. While the more powerful and better organized labor and environmental pressure groups, largely in the U.S., successfully pressed for respective protections, indigenous presence was far less noticeable. Consequently, any benefits or protections secured the indigenous were arrived at tangentially. Nevertheless, the import of the side agreements, no matter their caveats, is integral to the potential recognition and enforcement of Indigenous and human rights in general

A. *The Agreement on Environmental Cooperation*

Generally, the Agreement on Environmental Cooperation, or Environmental Side Agreement, commits Parties to more thoroughly enforce and develop domestic environment laws and regulations.¹⁰⁷ A correlate to this general obligation, parties are also obligated to increase access to environmental remedies through increasing their "transparency," i.e. increasing public awareness.¹⁰⁸ The agreement also provides domestic forums for environmental complaints and concerns by private citizens. Under the agreement, parties are committed to "publishing existing and proposed laws, regulations, and procedures, as well as administrative rulings respecting any matter covered by the Side Agreement."¹⁰⁹

The Environmental Side Agreement is composed of five parts. The preamble emphasizes the importance of recognizing that there are "growing economic and social links" between NAFTA countries, and calls for the pursuit of "principles such as transparency, international cooperation, and the right of states to be free from environmental injury from their neighbors."¹¹⁰ Similar to NAFTA's preamble, that of the Side Agreement also commits Parties to the pursuit of "sustainable development."¹¹¹

Part one of the Environmental Side Agreement provides a list of objectives. The objectives include: "cooperation for the protection of human populations, the environment, and flora and fauna; avoiding the creation of trade distortions or new trade barriers, enhancing compliance and

¹⁰⁷ See John J. Kim & James P. Cargas, *The Environmental Side Agreement to the North American Free Trade Agreement: Background and Analysis*, 23 ENV'T L. REP. 10720, 10730 (1993).

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.*

enforcement of environmental laws; and promoting transparency and public participation".¹¹²

The second part of the Environmental Side Agreement speaks to the substantive content of the agreement. The language of part two reflects sovereignty concerns, clearly articulating that each Party is responsible for setting and enforcing its own environmental regulations.¹¹³ Part two addresses governmental accountability in regard to environmental regulation, by allowing private parties to request investigations by "competent authorities."¹¹⁴ Part two also grants private parties access to judicial or quasi-judicial processes extant in the Party's laws.¹¹⁵

The institutional component of the Environmental Side Agreement is contained in part three. It provides for the establishment of the Commission for Environmental Cooperation (CEC).¹¹⁶ The Commission is composed of three distinct entities, a Council, Secretariat, and the Joint Public Advisory Committee (JPAC).¹¹⁷ The function of the Commission is to "promote cooperation on trade-related environmental issues between NAFTA Parties, to provide sustainable development, and to encourage compliance with applicable laws and regulations."¹¹⁸

As in the preceding part, part three also places great weight on the importance of sovereignty by identifying that the overall purpose of the CEC as encouraging the enforcement of each party's pre-existing environmental laws. However, part three adds that domestic laws must ensure "high levels" of regulation and that each Party must "strive to continue to improve those laws."¹¹⁹

The Council is a hybrid body serving administrative and legislative functions. Inter alia, the Council functions to:

[t]o seek sanctions or remedies to mitigate the consequences of violations of environmental laws; to promote and facilitate cooperation among the Parties with respect to environmental matters; to encourage effective enforcement of environmental laws and regulations; to carry out broad

¹¹² *Id.*

¹¹³ See Stenzel *supra* note 15, at 438

¹¹⁴ *Id.*

¹¹⁵ See *id.*

¹¹⁶ See *id.*

¹¹⁷ See DiMento & Doughman *supra* note 100, at 655.

¹¹⁸ Kluwer *Law International, Labor and Environment*, 1 WTR-NAFTA: L & Bus. REV. AN. 103 (1995).

¹¹⁹ Environmental Side Agreement art. 5(1).

policy functions, including providing assistance to the NAFTA Free Trade Commission in environmental-related matters; to develop recommendations with respect to environmental analysis; and to promote public access to information concerning the environment.¹²⁰

The Council meets annually reserving the right to reconvene upon a Party's request for special session to consider a complaint. To be heard by the Council, a complaint must allege that a Party has consistently failed to enforce its environmental laws, to the extent that a "persistent pattern" has been demonstrated.¹²¹ Should the Council find such a pattern to exist, corrective measures can be deployed, including, but not limited to facilitating consultations between the Parties, and the creation of arbitral panels.¹²²

With a full time staff, the Secretariat is the workhorse of the CEC. Sitting in Montreal, Canada, the Secretariat is responsible for overseeing general implementation of the Environmental Side Agreement. The Secretariat "serves the Council in the performance of several key functions," many of which include keeping the Council abreast of recent developments by preparing and filing reports.¹²³ In addition to an annual report, the Secretariat is responsible for preparing any special reports the Council may request. The Secretariat's duties also include screening complaints of Party non-enforcement.¹²⁴ It is important to note that complaints may be submitted by nongovernmental organizations (NGOs)¹²⁵, or any confirmed resident of a Party.¹²⁶

If the Secretariat finds a complaint meritorious, it has discretion to request an official response from the Party targeted in the complaint.¹²⁷ In such instances the targeted Party is supplied a copy of the complaint and afforded the opportunity to explain and clarify in response.¹²⁸ Responses may indicate that corrective measures will or have been taken and the na-

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *See id.*

¹²³ *See Kim & Cargas supra* note 107.

¹²⁴ *See id.*

¹²⁵ An NGO is defined as "any scientific, professional, business, non-profit organization or association which is neither affiliated with, nor under direction of a government". KLUWER LAW INSTITUTE *supra* note 118, at 106.

¹²⁶ *See DiMento & Doughman supra* note 100.

¹²⁷ *See id.* at 657.

¹²⁸ *See id.*

ture thereof, or if the matter is currently pending judicial decision.¹²⁹ If the latter is true, the matter will be summarily dismissed.¹³⁰

Should a Party refuse to respond, or if a response is made but ultimately found lacking, the Secretariat may petition the Council for the right to develop a factual record using the information it has gathered from the involved parties.¹³¹ A factual record may only be compiled upon a two-thirds affirmative vote in Council.¹³² Completed records are advanced to Council and the Council has discretion to make the report public or pass it further to the JPAC. The JPAC is a panel of governmentally appointed experts that furnishes the Secretariat with the scientific and technical information arising from Party's actions.¹³³ The Secretariat may also call upon the JPAC for aid in the development of factual records.¹³⁴

The fourth part of the Environmental Side Agreement deals primarily with fostering cooperation and the provision of information to the Secretariat. Part five establishes and details a consultation and dispute resolution processes for the Parties. The mainstay of part five is to foster cooperation and communication. By developing processes by which Parties may express concerns about how the others act, and facilitating forums in which solutions to such problems may be discussed. Not unlike mechanisms for the protection of human rights, it is only after the exhaustion of domestic remedies and the provisions of part five of the Side Agreement have been attempted that the sanctioning process can be considered.

(1) Sanctioning Under the Environmental Side Agreement

Sanctions are a last resort under the Environmental Side Agreement. The agreement itself is saturated with language calling for cooperation and encouraging consultations and informal dispute resolution. Should these relatively non-confrontational modes of resolution fail, the agreement provides for more formal dispute resolution by way of arbitral panels.

If and only if all other attempts to resolve problems fail and an offending party fails to follow the panel's action plan, may sanctioning

¹²⁹ See *id.*

¹³⁰ See *id.*

¹³¹ See Robert F. Housman, *The Treatment of Labor and Environmental Issues in Future Western Hemisphere Trade Liberalization Efforts*, 10 CONN. J. INT'L L. 301, 308 (1995).

¹³² See Stenzel *supra* note 15, at 440.

¹³³ See Kluwer Law International *supra* note 118, at 108.

¹³⁴ See J. Owens Saunders, *NAFTA and the North American Agreement on Environmental cooperation: A New Model for International Collaboration on Trade and the Environment*, 5 COLO. J. INT'L ENVTL L. & POL'Y 273, 295 (1994).

even be considered. As stated by one commentator, “[t]hus, the supplemental agreements focus not on sanctioning a party for failing or enforce its laws, but instead on aiding and encouraging the party to do so. The process to impose any form of sanctions is long and arduous, so much so that many question whether such sanctions will ever be applied”.¹³⁵ Limitations on the type and severity of available sanctions also speak to the agreements favor for less formal dispute resolution.

Article 34 of the agreement allows for the imposition of a monetary enforcement assessment. The annex to article 34 sets a ceiling for monetary enforcement assessments beginning at 20 million dollars U.S. in the first year of operation, and restricting such penalties thereafter to “.007 percent of total trade in goods between the Parties during the most recent year for which data are available.”¹³⁶ The annex also provides measures for the panel to consider in determining the amount of the assessment, i.e. a fine.¹³⁷ The factors listed for consideration are as follows:

[t]he pervasiveness and duration of the Party’s persistent pattern of failure to effectively enforce its environmental law; the level of enforcement that could reasonably be expected of a Party given its resource constraints; the reasons, if any, provided by the Party for not fully implementing an action plan; efforts made by the Party to begin remedying the pattern of non-enforcement after the final report of the panel; and any other relevant factors.¹³⁸

Thus, the Agreement’s propensity for cooperation and bent towards equitable resolution of disputes is even reflected in its punitive processes. Monies collected from fines are not given to the injured parties, but rather reinvested in the offending party by the CEC in a manner to encourage enforcement of the abrogated law.¹³⁹ Should an offending party fail to pay the fine, NAFTA benefits may be suspended under article 36, but only to an extent correlative with the amount of the fine.¹⁴⁰ The annex to article 36 further tailors the suspension option by providing instruction on which sectors the restrictions should be appropriately placed.¹⁴¹

¹³⁵ Housman *supra* note 131, at 308.

¹³⁶ Annex number 34.

¹³⁷ *See Id.*

¹³⁸ *Id.*

¹³⁹ *See* Housman *supra* note 131, at 308.

¹⁴⁰ *See* Stenzel *suupra* note 15, at 442.

¹⁴¹ *See* The Agreement on Environmental Cooperation, art. 36.

(2) Reactions and Consequences to the Environmental Side Agreement

As one may imagine, reactions to the Environmental Side Agreement also vary significantly. Similarly predictable opposition camps are composed predominately by environmentalists who feel the Agreement did not go far enough and more generally those in the business sector who feel the Agreement unnecessarily restrictive. The majority of commentaries, despite their sources, provide overwhelming negative reports on the Environmental Side Agreement. In addition to discontent with the content and scope of the Side Agreement, the institutions that make up the agreement, the dispute resolution provisions, and sanctioning process have all been subjected to scrutiny. As one commentator has pointed out, the Side Agreement and in particular the CEC which stems therefrom, have "flaws worth noting."¹⁴²

Institutional complaints center on the voluntariness of many of the Institutions' and Parties' duties. The word "may" is used several times throughout the Environmental Side Agreement in regards to the council, Secretariat and JPAC.¹⁴³ Bureaucratic difficulties have also been cited as major obstacles to the functioning of the CEC.¹⁴⁴ The inability of the CEC to report on how Parties can improve their laws is also cited as a major shortcoming of the institution.¹⁴⁵ The requirement that the Secretariat's reports are contingent upon a vote in Council is also viewed as a impediment to the Commission's efficaciousness.¹⁴⁶

The dispute resolution provisions of the Environmental Side Agreement have been criticized as having to high a threshold in order for complaints to be heard. It has been argued that the "persistent pattern" criterion allows random but egregious environmental abrogations to occur without redress. Others attack the sanctioning process asserting that it has few teeth and does very little to punish and discourage parties for noncompliance with the Agreement.¹⁴⁷ Others have gone so far as to label the Side Agreement completely "toothless."¹⁴⁸

¹⁴² Reid A. Middleton, *NAFTA and the Environmental Side Agreement: Fusing Economic Development With Ecological Responsibility*, 31 SAN DIEGO L. REV. 1025, 1047 (1994).

¹⁴³ *See Id.*

¹⁴⁴ *See* Jorge A Gonzales, Jr., *The North American Free Trade Agreement*, 30 INT'L LAW 345, 352 (1995).

¹⁴⁵ *See Id.*

¹⁴⁶ Reid *supra* note 142.

¹⁴⁷ *See* Dimento & Doughman *supra* note 100.

¹⁴⁸ Gonzales *supra* note 144, at 352.

While the Side Agreement's dentistry may be lacking, perhaps even by design, it may have unintentionally opened a small hole from which indigenous rights may flow. Despite the violence attributed to NAFTA by the indigenous, it may harbor a voice for asserting their rights. A non-governmental organization or resident of Chiapas or any other Mexican state is entitled to submit a complaint to the Secretariat should they be able to demonstrate a persistent pattern of environmental law non-enforcement.

Albeit a small step, the complaint mechanism established in the Secretariat does provide a forum for the indigenous to voice concerns and seek some redress, no matter how minimal. While the complaint procedure may be slow, bureaucratic and largely hidden from the public, it nonetheless brings attention to concerns.

Concomitant with and as a supplement to formal action, the media may also prove an invaluable tool to those disconcerted with a Party's acts. At the very least some public attention could come to the matter. While public attention may seem a negligible result, its salience should not be underestimated as it was an essential agreement in the creation and adoption of the side agreement, and an effective tool for gaining international support for Zapatista action.¹⁴⁹ The court of public opinion can provide an impetus for official action.

B. The North American Agreement on Labor Cooperation (NAALC)

Efforts to incorporate labor safeguards into NAFTA stemmed from concerns over discrepancies between U. S./ Canadian and Mexican labor regulations.¹⁵⁰ Variations in domestic labor laws in the U.S. and Mexico were predicted to have two problematic results. From the perspective of U.S. labor, fears emerged that low operation and labor costs in Mexico would lure industry and jobs out of the U.S. . The other preeminent labor concern was that Mexican industry would gain an unfair advantage in industry due to looser labor laws.¹⁵¹ Particular concern was paid to child labor and sweatshops. Occupational safety regulation and wages were also targeted as weaknesses in Mexican labor regulation.¹⁵²

¹⁴⁹ During the Zapatista uprising, technology and the media played a major role in alerting the world and NGOs as to the situation in Chiapas. Interestingly, the Zapatistas relied heavily on email to make contact with NGOs and solicit public opinion. The email campaign continues today with dozens of web sites in operation dealing with the Zapatistas and indigenous concerns.

¹⁵⁰ See Gregory J. Mertz, *Labor Issues Under the NAFTA: Options in the Wake of the Agreement*, 27 INT'L LAW 737, 738 (1993).

¹⁵¹ See *id.*

¹⁵² See *id.*

By its preamble, the North American Agreement on Labor Cooperation (NAALC) purports to create an expanded and secure market for goods and services produced in the NAFTA national territories; enhance competitiveness of national firms and global markets; create new employment opportunities; improve working and living conditions; and protect, enhance, and enforce basic worker's rights.¹⁵³ To promote these goals, the signatories are expected to abide by a myriad of labor laws and regulations aimed at maintaining level labor playing fields between the parties. Inter alia, NAALC requires signatories to promote and protect freedom of association and the right to organize, collective bargaining, and occupational health and safety.¹⁵⁴ NAALC also forbids forced labor, calls for the elimination of employment discrimination, and necessitates the implementation of child labor protections.¹⁵⁵ Aside, from listing ideals and expectations, however, NAALC neither creates nor calls for new law.

Rather than seeking to implement universal labor regulations for the parties, NAALC focuses on the enforcement and improvement of labor laws within each signatory nation. Thus, NAALC serves largely as a mandate for self-improvement. To operationalize NAALC, the parties agreed to create a Commission for Labor Cooperation (CLC).¹⁵⁶ The CLC has two components, a Ministerial Council and Secretariat.¹⁵⁷ As a whole the CLC is a neutral body. The primary purpose of the CLC is oversight.

The Ministerial Council is an executive body created to oversee implementation of the NAALC, and promote compliance and cooperation thereunder.¹⁵⁸ The Ministerial Council is composed of members appointed from each of the party nations.¹⁵⁹ The Secretariat is charged with assisting the Ministerial Council in its duties. The Secretariat is composed of an Executive Director and staff of fifteen.¹⁶⁰ The Secretariat is appointed by the members of the Ministerial Council; the Executive Director in turn

¹⁵³ *Implementation, Labor and Environmental*, 1 WTR NAFTA: L & BUS. REV. AM. 103, 109 (1995).

¹⁵⁴ *See id.*

¹⁵⁵ *See id.*

¹⁵⁶ *See* Laura Okin Pomeroy, *The Labor Side Agreement Under the NAFTA: Analysis of its Failure to Include Strong Enforcement Provisions and Recommendation for Future Labor Agreements Negotiated with Developing Countries*, 29 GEO. WASH. J. INT'L & ECON. 769, 775 (1996).

¹⁵⁷ *See id.*

¹⁵⁸ *See id.*

¹⁵⁹ *See id.*

¹⁶⁰ *See id.*

selects his or her staff of 15 from the party nations.¹⁶¹ The Secretariat is also responsible for preparing reports and conducting studies on party nation's labor practices.¹⁶²

The NAALC also requires that each party set up a National Administration Office (NAO). NAOs function as dispute resolution agencies, they are required to operate at the federal government level in each nation and establish communication with their foreign counterparts.¹⁶³ Each party nation's NAO serves as a complaint handling and information dissemination unit. NAOs are expected to maintain open lines of communication between nations.¹⁶⁴ Each NAO is required to share public information with their corresponding agencies, such as: descriptions of relevant laws in their respective jurisdictions; descriptions of procedures, policies and practices; and any possible changes or amendments thereto.¹⁶⁵

The NAO's main purpose is to hear complaints regarding the failure to enforce labor laws, provide requisite safeguards, or avoid unfair practices. Complaints may be brought by the government of a signatory country, an individual, or nongovernmental organizations.¹⁶⁶ A complaint may be filed with any of the three NAOs regardless of its origin. Once complaints are received, it is contingent upon the NAO to review them and chose a course of action. NAOs may order investigations of issues included in complaints. Prior to acting on a complaint or initiating investigations, NAOs are expected to send copies of the complaint to their counterparts.¹⁶⁷

As with the North American Agreement for Environmental Cooperation, the NAALC has also been heavily criticized. The agreements are similar in that neither sets universal standards. Rather, both agreements merely call for the enforcement of extant legislation. Thus, NAALC does very little to prevent a race to the bottom of labor standards. Similarly troubling is the fact that NAO's have unfettered discretion to decide whether to act on complaints. Under such a system fear of retaliatory complaints or investigations may provide powerful disincentives for party nations to file complaints against one another. However, such disincentives do not preclude political action: an course well demonstrated by the Zapatistas and their journey to the public eye.

¹⁶¹ *See id.*

¹⁶² *See id.*

¹⁶³ *See Labor and Environmental supra* note 118, at 109.

¹⁶⁴ *See id.*

¹⁶⁵ *See id.*

¹⁶⁶ *See Pomeroy supra* note 156, at 781.

¹⁶⁷ *See id.*

VII. LINKING TRADE AND HUMAN RIGHTS

Although the Side Agreements are criticized as largely ineffectual, they may in fact provide a conduit through which the indigenous, piggy backing on the right to environment, may progress and seek recognition of their rights.

NAFTA has been recognized by some as a "revolutionary attempt to provide a model for international trade law for reconciling trade values with social and environmental norms"¹⁶⁸, and "in establishing, as part of the *raison d'être* of a trade regime for North America, a procedural mechanism that provides for compromises between free trade and national labor, health and environmental regulation."¹⁶⁹ It has also been identified as the first international trade agreement to establish a methodology for merging social values and trade liberalization. However, the idea of linking trade to non-economic concerns is not novel. As Virginia Leary has articulated, trade linkage is not a new phenomenon, particularly with regard to the link between trade and labor standards.¹⁷⁰

In many respects labor has forged the trade linkage phenomenon.¹⁷¹ Despite this apparent congeniality, however, linkage was born of political realism. Rather than conscious attempts to advance social agendas, trade linking originally stemmed from fears of unfair competition¹⁷², fears that resurfaced and were largely responsible for the genesis and implementation of the Labor and Environmental Side Agreements to NAFTA¹⁷³.

Essentially, labor standards have been worked into trade agreements to level playing fields. In other words, rules have been created to prevent parties from benefiting from the exploitation of their work force by attempting to hold parties accountable to similar labor regulations. The absence of such rules, it is feared, will yield a slippery slope of compromising social concerns for economic advancement; a process referred to by one commentator as "social dumping."¹⁷⁴ However, standards and regulations

¹⁶⁸ Gonzales *supra* note 144, at 352.

¹⁶⁹ Garvey, 89 Am. J. Int'l L. 440.

¹⁷⁰ See Virginia Leary, *Workers Rights and International Trade*, 2 FAIR TRADE & HARMONIZATION 175, 182-85 (Jagdish Bhagwati & Robert E. Hudec eds.) (1996).

¹⁷¹ See generally, Daniel S. Ehrenberg, *The Labor Link: Applying the International Trading System to Enforce Violation of Forced and Child Labor*, 20 YALE J. INT'L L. 361 (1995).

¹⁷² See, e.g., Bartman S. Brown, *Developing Countries in the International Trade Order*, 14 N. ILL. U. L. REV. 347 (1994).

¹⁷³ See Ehrenberg *supra* note 171, at 365.

¹⁷⁴ See *id.*

on their own do little to encourage compliance and hence minimal utility unless consequences are attached to deviation.¹⁷⁵

According to the rational actor model, which reifies the nation state, a state will act in the manner that maximizes its return.¹⁷⁶ Hence, if left unpunished, a state is without incentive to refrain from unilaterally beneficial conduct that offends other states. Consequently, rules that are otherwise contrary to the state's interest will only be followed if sanctions are attached to noncompliance and the malady of the sanctions exceeds the harm caused by that the state must forfeit. Thus, it follows, as articulated by one commentator that, international trade is one area where states are materially interdependent and thus scrupulous about policing each other's behavior. No state can thrive and improve its people's standard of living without involving itself in world trade, hence, no state can afford to opt out of the rules and standards of the world trading system embodied in the GATT/WTO, the principal international institution regulating world trade.¹⁷⁷

While agreements and institutional agencies such as the General Agreement on Tariffs and Trade (GATT) and the World Trade Organization (WTO) function to promote compliance with fair play and some customary law, like UN conventions they too fall short of providing the leverage necessary to garner compliance. Moreover, GATT and the WTO have been criticized as having only shallowly integrated social norms, a limited mandate, and very limited monitoring capabilities.¹⁷⁸

Sovereign states, particularly those categorized as developing, are captive to trade. History is replete with instances of economic coercion among states attempting to forward an agenda, and it is a practice still very much alive today. Embargoes are commonly employed in attempts to press nations into conformity with specific laws. The most pronounced example of the practice in the United States embargo on Cuba.¹⁷⁹ International sanc-

¹⁷⁵ See *id.*

¹⁷⁶ See generally BRUCE BUENO DE MESQUITA, *THE WAR TRAP* (1981); FRANK C. ZAGARE, *GAME THEORY CONCEPTS AND APPLICATIONS* (1984).

¹⁷⁷ Ehrenberg *supra* note 171, at 375.

¹⁷⁸ See Richard H. Steinberg, *Trade-Environment Negotiation in the EU, NAFTA, and WTO: Regional Trajectories of Rule Development*, 91 AM. J. INT'L. 231, 233-40 (1997).

¹⁷⁹ See generally, Richard D. Porotosky, *Economic Coercion and the General Assembly: A Post-Cold War Assessment of the Legality and Utility of the Thirty-Five-Year Old Embargo Against Cuba*, 28 VAND. J. TRANSNAT'L L. 901 (1995) (tracing the history of economic coercion and examining the development of an international development of a norm against the practice).

tions on Iraq's oil and earlier pressure on South Africa in the apartheid era present similarly orchestrated efforts to promote human rights through the imposition of trade restrictions.

While such actions have been conducted with varying degrees of success, the effects they have on sanctioned countries can be crippling.¹⁸⁰ In fact, embargoes have been attacked as the source of human rights violations in and of themselves.¹⁸¹ In short, trade or perhaps more accurately threats not to trade, have historically been used as a stick. Embargo, refusal to trade, and withdrawal of aid and or investment, are punitive threats and actions. The NAFTA Side Agreements offer an alternative. Rather than imposing standards upon trading nations, the Side Agreements invite a conditioned participation. The subtle difference of offering incentives for compliance to environmental or labor norms rather than simply imposing them upon trade partners may make acceptance more palatable.

As with labor, the incorporation of environmental standards into trade was also breed largely by competitiveness.¹⁸² Again, countries with high environmental standards feared that they would be at a disadvantage when forced to compete with countries with less stringent regulations.¹⁸³ One common concern is that "substantial differences across countries will distort competition, create incentives for industrial relocation, or trigger a 'race to the bottom' in environment standard setting".¹⁸⁴

The Environmental Side Agreement represents a growing acceptance of linking trade with social issues by formally including it in a trade agreement and providing for its enforcement.¹⁸⁵ According to one commentator "the linkage between international trade and various other aspects of social life and concern, or as it is commonly referred to, the 'trade and ' has been the subject of increasing attention within academic and policy

¹⁸⁰ See *id.* 947-58.

¹⁸¹ See *id.* 944-47.

¹⁸² Daniel C. Esty & Damien Geradin, *Market Access, Competitiveness, and Harmonization: Environmental Protection in Regional Trade Agreements*, 21 HARV. ENV'T'L L. R. 265, 267 (1997).

¹⁸³ See *id.*

¹⁸⁴ *Id.*

¹⁸⁵ Just how well the side agreement provides for enforcement, as well as it's general utility, are largely up for debate. Nevertheless, its theoretical import is rich. Formal inclusion of environmental and labor concerns in a trade agreement (topics historically omitted from the body of trade agreements) is a first step towards more thorough and diverse mergers.

circles.”¹⁸⁶ The Labor and especially the Environmental Side Agreement have functioned to operationalize that which has formerly occupied only theoretical and philosophical domains. Consequently, expansion of linkage to include more social concerns, particularly, human rights concerns is now more foreseeable. To some the side agreement already represents the linkage of human rights and trade. The right to a clean environment is recognized by some as a human right in and of itself.¹⁸⁷

Issues of the environment and the Indigenous are intimately related. The Zapatista demands, as well as International Labor Organization Convention Concerning Indigenous And Tribal Peoples in Independent Countries (Convention 169)¹⁸⁸ and the Draft Declaration of the Rights of Indigenous Peoples, contain numerous references to the importance of the environment to the indigenous, often to the extent that environmental and indigenous rights are inseparable. Advances in environmental protection in many ways also advance in indigenous rights. In fact, “an evolutionary parallel between the preservation of the environment and the protection of indigenous right in the international arena” has been identified.¹⁸⁹

Furthermore, NAFTA has been referred to as teaching:

¹⁸⁶ Frank J. Garcia, *Trade and Justice: Linking the Trade Linkage Debates*, 19 U. PA. J. INT’L ECON. L. 391, 391 (1998).

¹⁸⁷ See *Id.*

¹⁸⁸ ILO Convention 169 contains a number of provisions of great relevance to the rights of the indigenous and trade. In particular, Article 7 parts 1 and 3, providing respectively that:

The peoples concerned shall have the right to decide their own priorities for the process of development as it affects their lives, beliefs, institutions and spiritual well-being and the lands they occupy or otherwise use, and to exercise control, to the extent possible, over their own economic, social and cultural development. In addition, they shall participate in the formulation, implementation and evaluation of plans and programs for national and regional development which may affect them directly; and. . . Governments shall ensure that. . . studies are carried out, in co-operation with the peoples concerned, to assess the social, spiritual, cultural and environmental impact on them of planned development activities. The results of these studies shall be considered as fundamental criteria for the implementation of these activities.

¹⁸⁹ Jose Paulo Kastrup, *The Internationalization of Indigenous Rights From the Environmental and Human Rights Perspective*, 32 TEX. INT’L L.J. 105 (1997).

two central lessons for public participation in trade. First, with rising public interest in trade agreements, the public will increasingly demand to participate in crafting these agreements. Thus, it is in the best interest of involved parties to ensure that this participation is informed and considered in the decision making process. Second, the NAFTA holds an important lesson for environmental proponents: international alliances among environmental groups are vital to advancing an environmental agenda in trade fora."¹⁹⁰

These lessons are not exclusive to environmentalists. Public awareness is imperative to the mission of humanizing trade. One of the Zapatistas' primary desires was the right to be heard and or consulted in regard to decisions affecting their future and way of life.¹⁹¹ Where governments may not always be receptive or even allow opportunity for citizen input, provisions such as those in the Side Agreement for transparency and public information breed a warmer climate for such considerations. Thus, in some respects, NAFTA embodies both the problem and the solution for the indigenous.

NAFTA, through its side agreements, harbors a gestalt shift for the world of international cooperation and the advancement of human rights. As nations are captive to economic forces and demands and proscriptions stemming therefrom much more than UN Documents and international instruments, trade could become a mode of seeking compliance with other norms. The side agreements, particularly the environmental side, created a partial merger of two historically competing agendas, international economy and the environment. While the sides do contain an enforcement mechanism and sanctioning provisions, the mainstay of the agreements centers on domestic remedies, consultation, and above all else encouragement and assistance in self guided change.

The practical significance of the side agreements, in their present state, to the indigenous of Mexico are rather limited. Should environmental conditions in Chiapas decline and remain consistently poor as a result of failure to enforce environmental regulations, or the loosening thereof, an NGO, group, or private citizen may file a complaint with the CEC. Similarly should violations of labor law be consistently abrogated a dispute resolution mechanism is also in place. However, as noted above, such complaints may or may not lead to any affirmative action on behalf of the CEC regulatory bodies.

¹⁹⁰ Housman *supra* note 104, at 390.

¹⁹¹ *See generally* Carrigan *supra* note 17.

The provisions in the Side Agreement pertaining to access to public information and transparency are also also important. As demonstrated in their electronic campaign which captivated a global audience, public participation can be a crucial factor in shaping governmental behavior. While the Zapatistas may identify the public information portion of the Side Agreement as too little too late, it is a step toward further democratization; a process that may yield the recognition of more rights.

Because acceptance of the agreements was a prerequisite for the passage of NAFTA, parties were wooed into approving them in order to reap the benefits of free trade. In this sense the carrot was offered to encourage compliance with environmental regulations. While a stick is still available through the enforcement mechanism it is relatively weak and difficult to employ. While the requirements of the side agreements are identified by many as minimal standards, and some even regard them as mere cosmetic attempts to appease certain interest groups, they are nevertheless a first step at advancing social policy concerns through trade. With discussion of expanding NAFTA to include other countries, the time for human rights interest groups to speak their mind is here.¹⁹² Following the lead of environmentalists and those concerned with labor, taking trade and human rights concerns public is the first step towards reconciliation.

VIII. CONCLUSION

As the North American Free Trade Agreement (NAFTA) progresses in its tenure, evaluations and reflection will abound. Analysts and commentators will continue to make proclamations for the future; those who made predictions will bend results to fulfill their prophecies. To be sure, legitimate benefits and detriments of NAFTA will be highlighted. The majority of evaluations will focus on the economic impact NAFTA has had on its parties. GNP's, per capita incomes, and import/export statistics will all be analyzed. The relative successes of the infamous Environmental, Health and Labor Supplemental Agreements, and the dispute resolution mechanisms therein, will also be topics of conversation. And maybe, just maybe, the impact that NAFTA has had on the indigenous of Mexico will also draw some attention.

With increasing technology and interaction, the forces of globalization are likely irreversible. Hence, the corporate world will inevitably touch even the most remote areas of the world. Also inevitable will be the change these forces have on peoples throughout the world. Unquestionably, global economic forces will continue to clash with traditional ways, as it has done

¹⁹² See Housman *supra* note 131, 303-304

throughout history. And unquestionably, these encounters will be viewed differently depending on one's world view.

However, despite one's posture, the continuing combination of worlds is something for which all must ready. For those concerned about the impact globalization and free trade has and will continue to have upon the less influential and under resourced of the world, it is time to embark in thought of compatibility and perhaps a kinder, gentler form of globalization of trade. One must consider the manners in which the forces of free trade and globalization may be harnessed to protect the very principles opponents feel they violate. As free trade agreements continue to be employed, and obstacles to trade lifted (as proposed in China and perhaps eventually Cuba), cultural and socio-economic collision of peoples will increase by several orders of magnitude. Rather than fighting such irreversible inertia, it is time to find ways to incorporate human rights concerns therein.

The Side Agreements, despite their efficacy, are salient symbolically if for no other reason. As noted *supra*, the NAFTA side agreements provide a formal effort to include human rights concerns into a trade agreement. Despite its caveats, and there are many, the side agreements represent a new paradigm in trade theory. Accompanying this gestalt switch, whether intended or not, is a new methodology and a new theater for the operationalization of historically difficult protections to implement.

Weaving human rights concerns into the fabric of international trade agreement may provide a more immediate and efficacious means for implementing human rights than any efforts past. Ironically, trade liberalization, which is often viewed as the enemy by human rights proponents, may harbor the unexpected ability to advance human rights norms. While the complaint and enforcement procedures included in the Environmental Side Agreement may not have much bite, their efficaciousness is less important at this stage than what they represent, could evolve into, and hopefully inspire.